POLICE POWER: PROPER AND IMPROPER MEANINGS.

Exact definition of legal terms is as rare as desirable. It is perhaps largely due to this desirability that it is a rare condition. In an effort to reach a common and accepted ground as to the meaning of terms, it is easy to imagine so many individual suggestions being made, that confusion, the very thing attempted to be prevented, has been increased.

The term "police power" is a case in point.* There are, at most, few terms the meaning of which are more indefinite, and more frequently distorted. This is true, not because definition has not been attempted, but because it has been attempted so frequently as to produce definitions with every shade of meaning, both as to kind and degree of content. Thus a leading law lexicon states that: "This power must be clearly defined from the administration of criminal law, and from the police regulations and the police authority, nor should it be confused with

*Editor's Note.—Notwithstanding the fact that the United States Supreme Court is so often called upon to determine questions of police power, the absence of definition by that court is accounted for in the rule governing the decisions, as thus expressed in the recent case of Cusack Company *v.* Chicago, 37 S. Ct. 190, 192, "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this court, concluding with Armour & Co. *v.* North Dakota, 240 U. S. 510, 514, 60 L. Ed. 771, 775, 36 S. Ct. 440, Ann. Cas. 1916D, 548, that further discussion of them would not be profitable, * * * We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. Jacobson *v.* Massachusetts, 197 U. S. 11, 30, 49 L. Ed. 643, 651, 25 S. Ct. 358, 3 Ann. Cas. 765."

A discussion of the more recent rulings of this court will be found in the Editorials of this issue.

eminent domain, as it sometimes has been done, nor with taxation." [1] On the other hand, Judge McClain, in his book on Constitutional Law, refers to the police power in part as: "The authority to declare what acts shall constitute crimes, and to provide for the trial and punishment thereof." [2] And the following definition clearly includes not only the division of law known as criminal justice, but the power of eminent domain, taxation, foreign relations, and war as well: "The police power of a state is that power which is necessary for its preservation and without which it cannot survive—the purpose for which it was formed." [3]

It is here proposed to give brief consideration to the confusion surrounding the terms "Police power" and to arrive at some conclusion as to its proper use.

Notwithstanding the confusion in definitions of police power, all definitions noted agree upon certain general properties possessed.[4]

In the first place it is universally admitted that this power is exercised for the purpose of advancing the general public welfare of the state. Thus whether the definition be extremely broad in its scope, as the statement that: "The term 'police power' means the general power of governing its people and domains belonging to every sovereignty," [5] or the narrow one that: ". . it does extend to the protection of the lives, health and property of the citizens, and to the preservation of the good order and the public morals," [6] it is clearly the opinion that the power is for the public benefit.

It is also generally admitted that the methods of the police power are compulsion. It should take no argument to show that the police power is an instrument of sovereignty acting to

1. Bouvier (Rawley's Third Revision) Law Dictionary, 2616.

2. McClain, Constitutional Law in the United States, 91.

3. Ex parte, Rowe 59 So. 69, 70; 4 Ala. App. 254. The above definitions are given as examples and with no intention of selecting the most practical, that being the purpose of a later section.

4. Freuend, Police Power, § 3, p. 3.

5. Appeal of Allyn, 81 Conn. 534; 23 L. R. A. (N. S.) 630; 12 Am. St. Rep. 225; 71 Atl. 794, 796.

6. Beer Co. *v.* State of Mass. 97 U. S. 25, 24 L. Ed. 989, 1877.

restrict private rights in behalf of the public. The power compels the complete or partial abandonment of rights, otherwise unrestricted, and in so doing compels a corresponding inhibition of their enjoyment.[7]

Another characteristic that may be noted as possessed by all definitions of the police power, is that all include the powers enumerated and included by the definitions of minimum breadth. That is, all definitions recognize certain minimum limits as constituting or including the police power. The great confusion with regard to the term is due to disagreement and dispute as to what extension, if any, should be made of these minimum limits. Thus the narrow definitions of the police power confine its extent to the so-called "primary social interests" by which is meant the public safety, order, morals, and health.[8] This fact is clearly stated in dictum of the United States Supreme Court thus: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives and property of its citizens, and the preservation of the good order and public morals." [9] And again, the same court in a subsequent dictum, notes that: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community." [10] Other of the narrower definitions might be quoted to demonstrate the same fact.[11]

On the other hand the broader definitions differ from the ones above quoted, not because they do not include the primary social interests, but because they include powers additional to

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7. State ex rel. Beck *v.* Wagner, 77 Minn. 483, 494, 80 N. W. 633; 77 Am. St. Rep. 681; 46 L. R. A. 422, 1899.

8. Freuend, Police Power, § 9, p. 7.

9. Beer Co. *v.* State of Mass. 97 U. S. 25, 24 L. Ed. 989, 1877.

10. Crowley *v.* Christensen, 137 U. S. 86, 11 S. C. 13.

11. 8 Cyc. 863, 864; City of Rochester *v.* West, 29 N. Y. App. Div. 125; 51 N. Y. S. 482; Lawton *v.* Steel, 152 U. S. 133, 14 S. C. 499; Cooley, Const. Lim. 6 ed., p. 704; Pomeroy's Constitutional Law, 10 ed., p. 314.

the primary social interests. Thus it should be clear that in the following definition: the police power is "the power vested in the legislature to make such laws as they shall judge to be for the good of the commonwealth and its subject," [12] the primary social interests are included. And in the statement that "police power, in its broadest sense, as sometimes defined, includes all legislation and almost every function of civil government," [13] they also are included, for laws in behalf of primary social interests both effect the "good of the commonwealth" and their promotion is a "function of government." [14]

From what has been said above,[15] it should be clear that the task of defining the term "police power" is not one of evolving a new definition but of adopting and justifying one of the many already evolved. The multitude of definitions including an infinite variety of powers renders new definition unnecessary, if possible, but at the same time makes selection and the justification of such selection correspondingly difficult.

The definitions confining the police power to the primary social interests would seem to be far superior for general use, to those more inclusive in extent. An important reason why the narrower definitions are more suitable for general use has already been indicated, by showing that there is no dispute as to the minimum limits of the police power, the only dispute being as to what extensions should be made from those minimum limits.[16] The mere fact that the propriety of extending the term to include more than the primary social interests is questioned, should be an important argument against such exten-

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12. Brown *v.* Walker, 204 U. S. 311, 27 S. C. 289, 51 Led. 499, Dictum.

13. Dictum Barbier *v.* Connelly, 113 U. S. 275.

14. See also Ex parte, Rowe, 59 So. 69, 70, 4 Ala. App. 254; Appeal of Allyn, 71 Atl. 794, 796, 81 Conn. 534, 2 L. R. A. (N. S.) 630, 129 Am. St. Rep. 225; Black's Const. Law, p. 29; Hare, American Const. Law, Vol. II, 766; Willoughby, The Constitution 1231, 1232; Com. *v.* Alger, 7 Cush 53, 884; Cooley, Const. Lim. 572; State ex rel. Beek *v.* Wagner, 77 Minn. 483, 494, 80 N. W. 633, 778, 1134; 77 Am. St. Rep. 681, 46 L. R. A. 442, 1899.

15. Supra, pp. 17-20.

16. Supra, 19.

sion. It is clear that to use the term in its narrower sense is to more nearly convey to all a clear conception of the meaning of the term, whereas to extend it beyond the universally conceded limits is to introduce confusion and argument [17] as to the propriety of such an extension.[18]

A second argument in favor of adopting the narrower definition is, that was the original meaning of the term, and it was only after the confusing influence of the hot disputes over slavery and states rights had been felt that there was any departure from the proper and original meaning.[19] In 1824 Marshall, Ch. J.,[20] in referring to the power of states to pass laws interfering with foreign commerce, first referred to the power afterwards designated the "police power" thus: "Since however in exercising the power of regulating their own purely internal affairs, whether trading or police, the states may sometimes enact laws, the validity of which depends on this interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry whether the (se) laws * * * have * * * come into collision with an act of congress * * * Should this collision exist, it will be material whether those laws were passed in virtue of a concurrent power to regulate commerce with foreign nations and among the several states, or in virtue of a power to regulate their domestic trade and police." The clear implication of this statement is that the power of the states to regulate their domestic commerce, and such power as they possess over commerce not domestic, is separate and distinct from the power termed the "power to regulate * * * their police." Although this distinction is not one that greatly limits the scope of the term, it at least excludes one class of power, clearly included by the most comprehensive definitions, quoted and referred to.[21] In 1837 the

17. Argument felt necessary to justify use of broad definition in License Cases, 5 Howard (U. S.) 504.

18. Noted but not explained in Guthris: The XIV Amendment, p. 74; Blagley: The Term Police Power, 59 Cent. Law Jr. 486, 1904.

19. Blagley: The Term Police Power, 59 Cent. Law Jr. 486, 1904.

20. Dictum, Gibbons *v.* Ogden, 9 Wheat (U. S.) 1,210, 1824.

21. Supra, pp. 1-2.

same court speaking through Barbour, J.,[22] again gave evidence of regarding the police power as less comprehensive than subsequently considered. The question before the court was the power of the State of New York to require certain reports from ship captains discharging passengers at ports of the state, irrespective of the originating of the passengers, and of the ship carrying them. The court said: "If, as we think, it be a regulation not of commerce, but police, then it is not taken from the states. * * * It appears from the whole scope of the law, that the object of the legislature was to prevent New York being burdened by an influx of persons brought thither in ships, either from foreign countries or from any other states: * * * Now we hold that * * * the end * * * (is) are within the competency of the states. * * * Let us see what purposes are left to the states. The Federalist in the '45 number speaking of this subject, says: 'the power reserved to the several states will extend to all the objects which in the ordinary course of affairs concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state. * * *' If (this regulation) is to secure that very welfare * * *" The court here clearly distinguishes between the power over commerce, and the police power, and indicates that the term is at least no more comprehensive and probably less so than the limits provided by the passage quoted from the Federalist. This again is clear evidence that the early uses of the term were considerably less comprehensive than the broad definitions now current. That the court regarded the term as even less comprehensive than the passage from the Federalist is clear from a later statement in the same opinion.[23] "But we do not put our opinion on this ground We chose to plant ourselves on what we consider impregnable positions. They are these: That the state has the same undeniable and unlimited jurisdiction * * * as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That by virtue of this it is not only the right but the burden and solemn

22. New York *v.* Miln, 11 Peters (U. S.) 130, 1837.
23. At p. 139.

duty of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare. * * * That all those powers which relate * * * to what may * * * be called internal police, are not thus surrendered or restrained." The implication of this passage is that at least the powers of "internal police" as thought of by the court would not include certain, governmental, administrative, etc., acts, and the branch of adjective law, which would be included in the quotation from the Federalist.[24] A further instructive reference to the police power is made by Story, J., in a dissenting opinion submitted at the same case. "I admit in the most unhesitating manner, that the states have a right to pass health laws, and quarantine laws and other police laws." [25] In 1842 it was clearly indicated that the court would restrict the breadth of the term by the following language: "And it could hardly be maintained that the arrest and confinement of the fugitive in a public prison under such circumstances until he could be delivered to his owner, was necessary for the internal police of the state, and therefore a justifiable exercise of the powers of police." [26]

Irrespective of the arguments already advanced in favor of the narrow definition in general use, sufficient justification is found upon consideration of logic alone. It should be quite evident that the protection of the public health, morals, and safety, and the protection from fraud, are different in kind from other clearly recognized public purposes, such as taxation, which is: "The publicly enforced contribution of persons and property, levied by the authority of the state for the support of the government and all public needs;" [27] "A pecuniary burden imposed for the support of the government;" [28] and eminent domain which is exercised where: "* * * private property is taken for public use, and the owner is * * * entitled to com-

24. Supra, 22.

25. At p. 153. Other references to power, Brown *v.* Md., 12 Wheat (U. S.) 419, 444, 1827; Marshall Ch. J.

26. Dictum Prigg *v.* Pa. 16 Peters (U. S.) 539, 1824. For explanation of its later extension see Blayley, The Term Police Power, 59 Cent. L. Jr. 486, 1904.

27. Cooley Taxation, § 1; Opinion of Justices, 58 Me. 591.

28. U. S. *v.* Rry. Co., 17 Wall. (U. S.) 322, 21 L. Ed. 597.

pensation therefor;" [29] and from the field of criminal justice and civil justice denoted as remedial.

In certain lines of cases where close reasoning is necessary because of the nature of the matter involved, courts have shown such a disposition to regard the police power narrowly, that there is some justification for concluding that in all decisions necessitating close distinction between what is and what is not the police power, made subsequent to the establishment of the "due process of law" restriction upon the police power of legislation, the narrow meaning has been adhered to.

One of the cases in which this close distinction is necessary is in the alteration of the provisions of corporate charters subsequent to issue. It is admitted in general that corporate charters constitute contracts with the state,[30] to which applies the constitutional prohibition of the violation of contracts.[31] Thus courts will hold unconstitutional laws rendering inoperative the previously granted burial privileges of a cemetery association, if it clearly appears that there is no question of the public health involved,[32] while on the other hand regulations suppressing lotteries,[33] changing grade crossings,[34] prohibiting the conduct of fertilizer plants,[35] and slaughter houses,[36] the sale of intoxicating liquors,[37] making railroad companies liable for stock killed in operation of the same,[38] and many others falling within the narrow scope of the police power, are upheld irrespective of the fact that they interfere with the unrestricted enjoyment of

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29. C. B. & Q. Rry. Co. *v.* People ex rel. Griswold, 72 N. E. 219, 224, 212 Ill. 103 (citing Frazer *v.* Chicago, 57 N. E. 1055, 186 Ill. 480, 51 L. R. A. 306, 78 Am. St. Rep. 296.

30. Bouvier, Law Dict. (Rawley's Third Revision), 2616; Freuend, Police Power, § 3, p. 3; C. W. Cook, What is the Police Power, 7 Col. L. J. 322.

31. U. S. Const., Art. 7, § 10.

32. Town of Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191; 22 Am. Rep. 71, 1873.

33. Stone *v.* Mississippi, 101 U. S. 814, 1879.

34. N. Y. & N. E. Rry. Co. *v.* Bristol, 151 U. S. 556, 1893.

35. Fertilizer Co. *v.* Hyde Park, 97 U. S. 659.

36. Butchers Union S. Y. Co. *v.* C. C. S. Y. Co., 111 U. S. 746, 1883.

37. Boston Beer Co. *v.* Mass., 97 U. S. 25, 24 L. Ed. 989, 1879.

38. Thorpe *v.* Ry. Co., 27 Vt. 140; 62 Am. Dec. 625, 1890.

privileges granted in corporate charters. These decisions go on the ground that the police power cannot be bargained away by contract or otherwise, but that regulations for other purpose interfering with such provisions embodied in contract cannot be upheld because they are not included within the police power.

An apparent exception to the assertion just made respecting the refusal of the courts to uphold any statutory interference with the contract portion of corporate charters is that changes of remedies existing at the time the charter was issued are upheld. Closer inspection of cases in which such provisions are upheld however clearly shows that it is done upon entirely different grounds, the reason being, not because the power to change remedies is a part of the police power by which a contract may be altered, but because the remedy is not a part of the contract,[39] and hence there had been no violation of the obligation of contracts, within the constitutional prohibition. Another evidence of this distinction is that where it can be proved that a given remedy is a part of the contract in question, change thereof will be considered a violation of contract, and hence unconstitutional.[40] Proof of this fact is generally made by showing that the change of remedy makes impossible the execution of the admitted terms of the contract. This places the apparent exception of change of remedies clearly in accord with the above stated rule. If the particular change of remedy is declared unconstitutional, it is not a part of the police power, because police regulations changing the terms of a contract are not declared unconstitutional, for the very reason that they are police regulations. On the other hand, if the changes are upheld it is not because they are police regulations but because they do not affect the contract. Among the remedial changes that have been upheld upon this ground a few are: changes in the method of valuing property at mortgage foreclosure,[41] corporate stockholders' liability,[42] methods of service upon corpora-

39. Hepburn *v.* Curts., 32 Am. Dec. 760, ? Watts 300, 1838.

40. Dictum Bronson *v.* Kinzie, 1 How. (U. S.) 311; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535.

41. Williams *v.* Waldso, 3 Scan (Ill.) 246, 1841.

42. Coffin *v.* Rich, 45 Me. 507; 71 Am. Dec. 559, 1858.

tions,[43] requirements as to payment of bank depositors,[44] statute of limitations.[45]

Distinction between remedial legislation and police measures is not only recognized at present, but such recognition has been given historically. Blackstone divides laws as follows: "* * * every law may be said to consist of several parts; one declaratory, whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down; another directory, whereby the subject is instructed and conjoined to observe those rights, and to abstain from the commission of those wrongs; a third remedial, whereby a method is pointed out to cover a man's private rights or redress his private wrongs; and to which may usually be added the fourth, usually termed the sanction, or our declaratory branch of the law, whereby it is signified what evil or penalty shall be incurred by those who commit wrongs or transgressions, or neglect their duty." [46] It is clear that the above statement of the consistent parts of a law recognizes remedial provisions as separate and distinct from those establishing rights and dues.

Hence it would seem that those definitions of the police power, confining its scope to regulations in behalf of the primary social interests: the public health, morals, safety, and economic welfare, would seem to be preferable upon the basis of considerations of expediency, logic, the original use of the term, and the practice of the courts where close definition is actually necessary.—*L. Dee Mallonee, in American Law Review.*

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43. Smith *v.* Bryan, 43 Ill. 364, 1864.

44. Banker's Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755, 1886.

45. Wood *v.* Cheild, 20 Ill. 211 1858. In many cases that were noted, but one justified remedial changes as police regulations (Barlaw *v.* Gregory, 31 Conn. 261, 1863) which involved the constitutionality of a law changing the method of counting days of grace when one was a holiday, thus being clearly remedial, and much in the minority.

46. Wendell, Blackstone's Commentaries on the Law of England, Vol. 1, p. 53ff.